

THE HONORABLE BARBARA J. ROTHSTEIN

U.S DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
TACOMA

GORDON HEMPTON,

Plaintiff,

v.

POND5 , INC., A DELAWARE  
CORPORATION; AND POND5 USER  
CKENNEDY342, A CORPORATION OR  
INDIVIDUAL OF TYPE UNKNOWN,

Defendants.

NO. 3:15-cv-05696-BJR

**PLAINTIFF'S REPLY IN SUPPORT OF  
MOTION FOR LEAVE TO AMEND  
COMPLAINT**

NOTE ON MOTION CALENDAR:  
September 23, 2016

**I. REPLY**

Pursuant to Fed. R. Civ. P. 15(a)(2) and 16(b)(4), Plaintiff Hempton moves for leave to file a First Amended Complaint. Plaintiff requests that his motion for leave to add unknown persons or entities (“John Does”) who have purchased or downloaded his copyrighted works from Defendant Pond5’s website be granted. There is a good cause for modifying the Court’s scheduling order regarding the deadline to join additional parties, Plaintiff has not been dilatory in seeking to amend, and Pond5 will not be prejudiced by the amendment.

**A. Plaintiff Has Not Been Dilatory In Seeking to Amend**

Pond5 confirmed in its August 25, 2016 30(b)(6) deposition that it has made no efforts to contact its customers who downloaded ckennedy’s infringing works, nor made any effort to recall the infringing works. *See* Crary dep. at 224-228, ex. 1 to Townsend decl., dkt 37.

Pond5 argues in its Opposition that it had already told Plaintiff in discovery responses in January and then March that Pond5 had made no efforts to contact customers or recall Mr. Hempton’s works. Opp. at 5. By joint stipulation, however, the parties had agreed to limit discovery to the safe harbor issue between March and July 2016, and by joint stipulation, the parties set a 30(b)(6) deposition of Pond5 for late summer after discovery had resumed. Thus, Plaintiff – by Pond5’s agreement – had *no occasion* prior to the August 25 deposition to question Pond5 about the content of its discovery responses and to confirm that Pond5 not only *had not* contacted its customers or attempted to recall Mr. Hempton’s content, but had no imminent plans to do so. Further, filing the instant motion for leave to amend and the accompanying discovery motion (to compel the identities of the John Does) during the period of the stipulation would have violated the terms and purpose of that stipulation, which was to attempt to resolve the matter in settlement and resolve Pond5’s safe harbor affirmative defense before both parties began to expend the resources of litigating the case in full. *See* March 2016 stipulation, Townsend decl. dkt. 37, ex. 4.<sup>1</sup> Pond5 cannot claim that Plaintiff has been “dilatory” in taking action on its discovery,

<sup>1</sup> Had Plaintiff filed this motion in March, there is no doubt that Pond5 would have protested and argued that it is premature to add defendants on liability before the issue of its safe harbor affirmative defense has been briefed and resolved.

1 when Pond5 stipulated to the timing and order of that discovery.

2 From this August 25 deposition, Plaintiff confirmed that he would need to pursue  
3 contacting and getting recourse and relief from the customers directly. Crucially, Plaintiff also  
4 confirmed in the August 25 deposition that Pond5 does not indemnify or hold harmless its  
5 customers in these situations. Crary dep., ex. 1 to Townsend decl., dkt 37, at 218. Thus, to get  
6 complete relief for the initial infringement and any continuing infringements, Plaintiff would need  
7 to include the customers in this action, or at the very least, obtain their identities and contact  
8 information and seek recourse from them directly. Within two weeks of the deposition, he filed  
9 the instant motion for leave to amend. Plaintiff has not been dilatory.

10 **B. Pond5 Will Not Be Prejudiced By the Amendment**

11 Pond5 will not be prejudiced by the amendment, largely because the amendment has  
12 become necessary due directly to Pond5's actions and policies. Had Pond5 promptly and  
13 diligently contacted its customers and attempted to recall the infringing content and minimize  
14 continuing damages to Mr. Hempton's copyrights, Plaintiff may not have needed to go after the  
15 customers directly. Pond5 has not done so *to preserve its reputation* (as it openly acknowledges in  
16 its Opposition to Plaintiff's Motion to Compel, dkt. 39), without regard for the damage to Mr.  
17 Hempton's copyrights and reputation.

18 Moreover, given that Pond5 has adamantly insisted that it does not indemnify or hold  
19 harmless its customers in a situation like this, even though they may have been unwitting  
20 consumers, Plaintiff has no choice but to include all parties in this litigation who are necessary for  
21 full and complete relief. Should Plaintiff prevail on liability, Pond5 will no doubt point to this  
22 policy as a defense to damages, and argue that it is not liable for and should not have to  
23 compensate Plaintiff for any subsequent infringement by its customers. Pond5 admits in its  
24 Opposition that the customers are crucial parties, stating that "[s]uch litigation will also likely  
25 bring cross-claims against Pond5 and responsive cross-claims by Pond5." Opp. at 6. This is  
26 Pond5's own legal and policy decision, and it cannot protest the logical consequences of that  
27 decision.

1 Plaintiff, Pond5, and Pond5's customers will litigate this matter regardless of the outcome  
 2 of the present motion. Pond5's customers will either be included in the present caption or in a  
 3 subsequently filed John Doe action. There is no claim that the statute of limitations has expired  
 4 and, should Pond5 prevail on the present motion, the next step will likely to be to file a new  
 5 action, seek leave to conduct discovery, seek discovery from Pond5, meet and confer, move to  
 6 compel, and subsequently name the individuals in that action when Pond5 is ultimately required to  
 7 identify them. If Pond5 is able to defeat the present motion for leave to amend, then the outcome  
 8 will only be delay and increased legal fees. The issue is whether the claims against individual  
 9 Pond5 customers can proceed here in a case that is already moving along where the both parties  
 10 have already appeared and are actively litigating, or in a new case that would start over with a new  
 11 calendar or that could be consolidated with the present matter.

12 It is in the interest of efficient adjudication of the claims against Pond5 customers to grant  
 13 the motion for leave to amend. Any arguments regarding the merits of those claims can be timely  
 14 litigated by the defendants. Neither Pond5 nor its customers will be waiving any defenses by  
 15 virtue of granting the present motion for leave to amend.

## 16 II. CONCLUSION

17 Motions for leave to amend are freely granted for a reason. In the present matter, Plaintiff  
 18 has diligently pursued his claims and, in the course of litigation, Pond5's litigation strategy has  
 19 necessitated Plaintiff naming Pond5's customers. The only issue is whether that litigation should  
 20 occur in the present action or in a new filing. Moreover, any new filing would likely be  
 21 consolidated with the present matter. It is in the interest of efficient and full adjudication of the  
 22 disputes arising out of and related to the sale of Mr. Hempton's works to assess, handle, and  
 23 resolve them in a single caption.

24 For the above reasons, Plaintiff requests that the Court grant Plaintiff's motion for leave to  
 25 amend his Complaint.

Signed this 23rd day of September 2016.

BRESKIN JOHNSON & TOWNSEND, PLLC

By: s/ Roger M. Townsend

Roger M. Townsend, WSBA #25525

s/ Cynthia J. Heidelberg

Cynthia J. Heidelberg, WSBA # 44121

1000 Second Avenue, Suite 3670

Seattle, WA 98104

(206) 652-8660 Telephone

(206) 652-8290 Facsimile

rtownsend@bjtlegal.com

cheidelberg@bjtlegal.com

s/ Nicholas Power

Nicholas Power, WSBA # 45974

The Law Office of Nicholas Power

540 Guard Street, Suite 150

Friday Harbor, WA 98250

360-298-0464

nickedpower@gmail.com

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 23, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Jamie Telegin

Jamie Telegin, Legal Assistant